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In the
Supreme Court of the United States

OCTOBER TERM, 1968

No. 856

EXCHANGE NATIONAL BANK OF CHICAGO, a national banking association

Petitioner

vs.

HOMER A. BONHIVER, as Receiver of American Allied Insurance Company, and SIDNEY P. ABRAMSON

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INDEX

PAGE

Opinions below 1

Jurisdiction 2

Question presented 2

Statutes involved 2

Statement of the case 3

Reasons for allowance of the writ 6

Conclusion 11

Appendices:

A. Statutes A-1

B. Order below B-1

C. Opinions below C-1

D. Opinion in companion case D-1

CITATIONS

Cases:

Bruns, Nordeman & Co. v. American National Bank & Trust Co., 394 F.2d 300 (2d Cir. 1968), cert. den. — U.S. —, 89 S. Ct. 97 10

Buffum v. Chase National Bank, 192 F.2d 58 (7th Cir. 1951), cert. den. 342 U.S. 914 10

Leonardi v. Chase National Bank of City of New York, 81 F.2d 19 (2d Cir. 1936), cert. den. 298 U.S. 677 10

Mercantile National Bank at Dallas v. Langdeau, 371 U.S. 555 (1953) 5, 7, 8, 9, 10, 11

Statutes:

12 U.S.C., Section 94, Rev.Stat. §5198 (1878) ...2, 4
28 U.S.C., Section 1254(1) 2
28 U.S.C., Section 1257 7
28 U.S.C., Section 1291 .....2, 9
28 U.S.C., Section 1292(b) 5
28 U.S.C., Section 1332 3

Miscellaneous:

Federal Rules of Appellate Procedure, Rule 4 6

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Exchange National Bank of Chicago, a national banking association, prays that a writ of certiorari issue to review the order dismissing appeal, entered in this cause by the United States Court of Appeals for the Eighth Circuit on October 14, 1968.

CITATIONS TO OPINIONS BELOW

The order dismissing appeal dated October 14, 1968, was entered without opinion. An opinion delivered earlier in this cause by the United States District Court for the District of Minnesota, Third Division, dated February 3, 1968, under the caption *Exchange National Bank of Chicago* v. *Abramson*, printed in Appendix C hereto, *infra* pp. C-1 - C-8, is reported in 278 F.Supp. 849 (1968). An opinion delivered by the same District Court on April 11,

1968, in a companion case, *Allied Realty of St. Paul* v. *Exchange National Bank of Chicago,* printed in Appendix D hereto, *infra* pp. D-1 - D-16, is reported in 283 F.Supp. 464 (1968).

Memorandum opinions in this cause by the District Court were delivered on August 20, 1968 and September 24, 1968, and are printed in Appendix C hereto, *infra* pp. C-8 - C-28 and C-28 - C-32, respectively. The August 20, 1968, opinion is reported in 45 F.R.D. 97 (1968), but thus far the September 24, 1968, opinion is unreported.

JURISDICTION

The order of the Court of Appeals dismissing petitioner's appeal was dated and entered on October 14, 1968. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether a district court order which overrules a plea of venue privilege by a national banking association is a final decision from which appeal may be taken.

STATUTES INVOLVED

The venue privilege of national banking associations is contained in 12 U.S.C., Section 94, Rev.Stat. §5198 (1878), printed in Appendix A hereto, *infra* p. A-1. The provision for appeals from final decisions of district courts is 28 U.S.C., Section 1291, printed in Appendix A hereto, *infra* p. A-1.

STATEMENT OF THE CASE

This cause was commenced on January 25, 1968, when petitioner filed its complaint in the United States District Court for the District of Minnesota, Third Division, against Sidney P. Abramson ("Abramson"). Federal jurisdiction for this complaint was sought to be based on diversity of citizenship under 28 U.S.C., Section 1332; the complaint alleged that petitioner was a national banking association located in Illinois, that Abramson was a citizen of Minnesota, and that the matter in controversy exceeded (exclusive of interest and costs) the sum of $10,000.

The complaint further alleged that Abramson, a former Assistant United States Attorney and Special Assistant United States Attorney, had aided in the preparation and prosecution of a federal criminal case in which former employees of petitioner had been indicted; that Abramson was thereafter retained as Special Counsel (to act with previously appointed counsel) by Homer A. Bonhiver, Receiver of American Allied Insurance Company ("Receiver"), on the basis of Abramson's knowledge and background gained in the criminal case, to represent Receiver in asserting a $10,500,000 claim against petitioner based on the same alleged transactions as were charged in the indictments and trial of the criminal case; and that Abramson, in thus serving as co-counsel for Receiver in connection with the same matters Abramson had investigated and passed upon while in public employ, was acting in clear violation of Canon 36 of the Canons of Professional Ethics of the American Bar Association.

Abramson responded to the complaint with a counterclaim seeking vindication on the Canon 36 issue, and Receiver was given leave to intervene on the basis of a ten-

dered pleading which was directed solely and exclusively to the Canon 36 issue.

Petitioner moved for a preliminary injunction to restrain further violations of Canon 36. This motion was denied by the District Court. (The District Court's opinion is printed in Appendix C hereto, commencing at page C-1.) On appeal by petitioner, the United States Court of Appeals for the Eighth Circuit ruled on February 15, 1968—without opinion—that the amount in controversy on the Canon 36 issue did not exceed $10,000 and that the federal courts therefore did not possess jurisdiction of the subject matter. Petitioner sought rehearing before the Eighth Circuit, but its petition was denied, and on April 15, 1968, the District Court entered an order dismissing petitioner's complaint pursuant to the mandate of the Eighth Circuit.

Meanwhile, on February 5, 1968, Receiver moved in the District Court for leave to file its $10,500,000 claim against petitioner in the form of a counterclaim as part of a pleading entitled "Amended Answer and Counterclaims of Intervenor." On February 20, 1968, petitioner moved to deny Receiver leave to file the $10,500,000 counterclaim. The grounds relied on for petitioner's motion included improper venue under Rev.Stat. §5198, 12 U.S.C. §94.

On August 20, 1968, the District Court entered an order granting Receiver leave to file the $10,500,000 counterclaim and rejecting petitioner's motion in all respects, including petitioner's objection to venue under 12 U.S.C. §94. The District Court's opinion is printed in Appendix C hereto, commencing at page C-8.

On August 27, 1968, petitioner served its motion in the District Court to amend the order of August 20 to include findings that would have enabled petitioner to apply for

permission to appeal to the Eighth Circuit under the federal law governing appeals from interlocutory orders. (28 U.S.C. 1292(b)) Petitioner's motion to amend was denied by the District Court's order of September 24, entered September 26, 1968. The District Court's memorandum accompanying the order of September 24 is printed in Appendix C hereto, commencing at page C-28.

Although it was petitioner's view when it sought to amend the August 20 order that said order was interlocutory, petitioner reconsidered the question following the order of September 24 and came to the studied conclusion, based on a careful re-examination of this Court's opinion in the case of *Mercantile National Bank at Dallas* v. *Langdeau*, 371 U.S. 555 (1963), that the August 20 order was final and, therefore, appealable.

Accordingly, on October 2, 1968—one week after denial by the District Court of petitioner's motion to amend the August 20 order—petitioner gave notice of appeal to the Eighth Circuit from the August 20 order.

On October 4, 1968, Receiver moved in the Eighth Circuit to dismiss petitioner's appeal on the ground that the August 20 order was "interlocutory in nature and therefore not appealable." Receiver also contended that the notice of appeal had not been timely filed.

On October 14, 1968, the Eighth Circuit entered the order which is the subject of this petition for certiorari. In a two-sentence statement—without opinion—the Eighth Circuit ordered that the appeal be dismissed. The Eighth Circuit's order of October 14 is printed in Appendix B hereto, *infra* page B-1.

To complete the background, it should be mentioned that after the Eighth Circuit had dismissed petitioner's com-

plaint against Abramson on jurisdictional grounds, petitioner raised the same Canon 36 issue as to Abramson in a related case also pending in the United States District Court for the District of Minnesota, Third Division, entitled *Allied Realty of St. Paul* v. *Exchange National Bank of Chicago*. On April 11, 1968, the District Court entered an order finding that Abramson's representation of Allied Realty (a wholly owned subsidiary of American Allied Insurance Company) was a violation of Canon 36 and enjoining Abramson from acting as counsel in any matter involving claims raised in the criminal trial in which Abramson had served as Assistant and Special Assistant United States Attorney. The District Court's opinion is printed in Appendix D hereto, commencing at page D-1. Abramson has appealed to the Eighth Circuit, seeking to reverse the order. and petitioner has cross-appealed, seeking to broaden the order.

REASONS FOR ALLOWANCE OF THE WRIT

Petitioner is a national banking association. Petitioner's plea of venue privilege was overruled in the District Court by order of August 20; petitioner's motion to amend the August 20 order was served on August 27 and was denied by order of September 24, entered September 26; and petitioner gave notice of appeal to the Eighth Circuit on October 2. Since petitioner's 30-day period for appeal under Rule 4 of the Federal Rules of Appellate Procedure did not begin to run until the entry of the order on September 26, it is clear that notice of appeal given on October 2—six days after the entry of the order denying petitioner's motion to amend—was timely.

It is, therefore, apparent that the Eighth Circuit dis-

missed the appeal on the ground that the District Court's order overruling petitioner's plea of venue privilege was interlocutory and not appealable.

We believe that the decision of the Eighth Circuit in this regard is in direct conflict with the decision of this Court in the case of *Mercantile National Bank at Dallas* v. *Langdeau*, 371 U.S. 555 (1963).

In *Langdeau*, a receiver for a Texas insurance company filed an action in Travis County, Texas, against two national banks and 143 other defendants, alleging a conspiracy to defraud the insurance company. Each national bank filed a plea of privilege,

> ". . . asserting that it was located in Dallas County, Texas, and was therefore immune from suit in Travis County under the provisions of Rev.Stat.§5198 (1878) 12 U.S.C. §94, which provides:
>
> " 'Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State. county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.' " (371 U.S. at 556).

The pleas of the banks were overruled and they appealed. The Texas Court of Civil Appeals reversed and sustained the pleas of privilege. The Texas Supreme Court reversed again and overruled the venue pleas. The banks then appealed to this Court under 28 U.S.C. §1257, which permits appeals in certain cases from "[f]inal judgments or decrees rendered by the highest court of a State."

The rulings in *Langdeau* would seem to have been even less "final" than the ruling in our case. In both cases, a

venue plea was overruled. In *Langdeau*, moreover, there were 143 other defendants in addition to the two national banks, while in the case at bar petitioner is the sole defendant in Receiver's counterclaim.

Mr. Justice White, in his majority opinion in *Langdeau*, recognized that there was a finality question.

> ". . . and, because of the finality question, we postponed ruling upon our jurisdiction until the merits [of the venue plea] were considered" (371 U.S. at 557).

The first section of the majority opinion is devoted to the finality question. Justice White held that the orders denying the venue pleas of the banks were appealable.

> "The question of our appellate jurisdiction is quite similar to the one considered in *Construction Laborers* v. *Curry, ante,* p. 524, although there the jurisdiction of any and all state courts was at issue and here the inquiry is only as to which state court has proper venue to entertain an action against two national banks. Nonetheless, a substantial claim, appealable under state law, is made that a federal statute, rather than a state statute, determines in which state court a national bank may be sued and, as in *Curry,* prohibits further proceedings against the defendants in the state court in which the suit is now pending. *This is a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action.* Moreover, *we believe that it serves the policy underlying the requirement of finality* in 28 U.S.C. §1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to *long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings.* Accord-

> ingly, we note our jurisdiction to hear these appeals under §1257(2) and turn now to the question of whether appellants may be sued in the Travis County court." (371 U.S. at 557-558) (Emphasis added.)

The language of *Langdeau* is squarely applicable to the instant case. Petitioner herein has asserted at every opportunity in the courts below that the federal statute governing venue over national banks—the same statute relied upon by the banks in *Langdeau*—prohibits further proceedings in the court in which the $10,500,000 counterclaim is now pending. This venue question—exactly as in *Langdeau*—is a separate and independent matter, anterior to the merits and not enmeshed in the issues comprising Receiver's counterclaim.

Petitioner in this case appealed to the Eighth Circuit under 28 U.S.C. §1291, allowing appeals "from all final decisions of the district courts." We see no difference between "final decisions" under §1291 and "final judgments or decrees" under §1257 (the section involved in *Langdeau*). The "finality" required under federal law is the same, and it will serve the policy underlying that requirement to determine now—just as was done in *Langdeau*—in which court petitioner may be tried rather than to subject petitioner, Receiver and trial court "to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings."

In this connection, petitioner pointed out to the courts below that the criminal case terminated in a verdict of acquittal after three months of trial, and that the trial and pretrial proceedings in the $10,500,000 counterclaim would inevitably be lengthy and complex.

As the *Langdeau* case illustrates, the courts are extremely protective of national banks as to venue. Statutory language which could be interpreted as permissive is interpreted unequivocally as mandatory. Venue restrictions can always be waived, but in the case of national banks, courts are loathe to declare them waived. See, e.g., *Buffum* v. *Chase National Bank*, 192 F.2d 58 (7th Cir. 1951), cert. den. 342 U.S. 914. It has recently been held that the venue privilege of a national bank is not overcome even by the special venue provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934. *Bruns, Nordeman & Co.* v. *American National Bank & Trust Co.*, 394 F.2d 300 (2d Cir. 1968), cert. den. — U.S. —, 89 S.Ct. 97.

In many ways and in numerous decisions, courts have gone out of their way to find a national bank legally immune to suit except in the jurisdiction in which the bank was established and where it maintained its principal place of business—even in the case of banks which operate branches. See, e.g., *Leonardi* v. *Chase National Bank of City of New York*, 81 F.2d 19 (2d Cir. 1936), cert. den. 298 U.S. 677.

In *Langdeau*, this Court passed upon an order with reference to venue which might, in the ordinary case, be considered an interlocutory order and therefore not appealable until final judgment, and held in the case of a national bank that such an order is final and therefore reviewable.

Unless certiorari is granted in the instant case and the Eighth Circuit's dismissal of petitioner's appeal is reversed—a dismissal so clearly in conflict with the decision of this Court in *Langdeau*—petitioner will have to wait until the end of a lengthy trial to re-assert its venue

privilege. By then, petitioner will have already suffered a lengthy interruption in its business as a national bank recognized as an evil in *Langdeau* (371 U.S. at 561 n.12), and the venue privilege expressly granted by Congress to national banks will have been seriously undermined.

CONCLUSION

For all of the foregoing reasons, we ask that this petition for a writ of certiorari be granted.

Respectfully submitted,

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